STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	)	Docket No. 02-AFC-4
	)	
Application for Certification for the Walnut Energy Center	)	
	)	

APPLICANT'S REPLY BRIEF

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I. INTRODUCTION

Pursuant to the Committee's direction at the close of Evidentiary Hearings on October 9, 2003, the Turlock Irrigation District ("Applicant") hereby files the following Reply Brief for the Walnut Energy Center ("WEC") Application for Certification ("AFC").

As the Staff notes in its Opening Brief, the Applicant and the Staff of the California Energy Commission ("Commission") are in substantial agreement regarding all but four issues: two air quality Conditions of Certification, one compliance Condition and one land use Condition.

In the three subject areas where differences remain between the Staff and Applicant – air quality, compliance and land use - the Staff concedes that the WEC *complies* with the applicable LORS in these areas. The record is also quite clear that the local land use agency and the regional air quality agency responsible for enforcing the LORS (but for the Commission's preemptive jurisdiction) do not support the disputed conditions as proposed by Staff. The Staff asserts in its Opening Brief that in all three areas – air quality, compliance and land use – "the staff position best reflects the appropriate balance between deference to the other entities….and

the Commission's responsibilities to ensure compliance with CEQA and protection of public health and safety." (Staff's Opening Brief, p. 19) Yet, as this Reply Brief will demonstrate, the Staff has asserted a position of defiance, rather than deference, to the views of the responsible local and regional agencies. It is precisely because the Staff's positions are so shrill, so unbalanced and so unfounded that these issues must be resolved by the Commission. As we discuss below, if these issues are resolved based on record evidence and with the degree of deference the Commission has historically extended to responsible agencies, the Commission will adopt the position adopted by these agencies and the Applicant on each of the disputed issues.

II. THE COMMISSION SHOULD GRANT APPROPRIATE DEFERENCE TO THE FINDINGS OF LOCAL AND REGIONAL AGENCIES WITH PRIMARY PERMIT JURISDICTION

The Commission has historically granted significant deference to the findings of local and regional agencies who would exercise permit jurisdiction but for the Commission's preemptive jurisdiction. While the Warren-Alquist Act provides that the "issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency ….for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency…" the Legislature clearly intended local and regional agencies to have a significant voice in the licensing proceeding. Upon receipt of an Application for Certification, the Commission is required to "forward the application to local governmental agencies having land use and related jurisdiction in the area of the proposed site and related facility. Those local agencies shall review the application and submit comments on [all] appropriate aspects of the design, construction, or operation of the proposed site and related facility." If "the commission

finds that there is *noncompliance* with any state, local, or regional ordinance or regulation in the application, it shall consult and meet with the state, local, or regional governmental agency concerned to attempt to correct or eliminate the noncompliance. If the noncompliance cannot be corrected or eliminated, the commission shall inform the state, local, or regional governmental agency if it makes the findings required by Section 25525."[1] (Public Resources Code § 25523(d); emphasis added) Again, in this case, there is no claim of "noncompliance" with applicable LORS. Instead, in each case, Staff simply asks for additional mitigation – above and beyond the mitigation already in place.

An excellent recent example of the Commission's historical deference to the findings of responsible local and regional agencies is the Commission's Final Decision approving the East Altamont Energy Center, in which the Commission stated that "the Energy Commission as the lead agency will give deference to local governments interpretation of their Land Use LORS and policies except when such an interpretation would lead to a factual error in our Decision." (East Altamont Energy Center LLC Final Decision, CEC Docket No. 01-AFC-4, p. 368) In that Decision the Commission did not place a high burden of proof on the local jurisdiction in order to uphold the local agency's findings. The mere fact that the local agency's determination was "plausible" was sufficient for the Commission to "feel bound" by the local agency's findings. (*Id*. at 369-370; See also Los Esteros Critical Energy Facility Final Decision, CEC Docket No. 01-AFC-12, pp. 345-46.)

This deference is not limited to land use issues. The Commission extends the same degree of deference to other local and regional agencies. For example, in the area of air quality,

[1] In the instant case, the Commission is presented with a situation in which the local agency finds the project to be in compliance with LORs and another party (the Staff) is asking the Commission to override the local agency's findings of compliance. The Warren-Alquist Act does not address this extraordinary circumstance in which local laws could be overridden in order to deny a license for a project which was in compliance with all applicable laws.

the EAEC decision stated: "In weighing the evidence the Committee must assign appropriate weight to the information presented to it. When considering evidence/testimony from the responsible local agencies, the Committee has historically given significant weight to its assessments and recommendations." (East Altamont Energy Center LLC Final Decision, *supra* at 137) Applying this standard to the Staff's efforts to contest the finding of two local air districts, the Commission found "no reason to override their decision." (*Id*. at 145)

With respect to air quality, the Commission's determination of compliance with applicable LORS is a limited review, given that the air quality permits under review are issued by a local air pollution control district exercising federal permitting authority. The limited scope of the Commission's review of air quality LORS compliance is clearly established in the Memorandum of Agreement between the Commission and the Air Resources Board and the Commission's implementing regulations. To the Applicant's knowledge, the Commission has never issued a decision that contradicts the LORS findings of an air pollution control district.

In the instant case, the Commission is presented with clear findings by responsible local and regional agencies. In each instance the findings of the permit agency are not merely plausible, the findings are supported by substantial evidence:

- Findings by the SJVUAPCD, contained in the Final Determination of Compliance, that establish a 10 ppm ammonia slip limit (Ex. 41, Attachment A, p. A-5, Condition 37). The SJVUAPCD has reviewed this issue, and has concluded that a 10 ppm ammonia slip limit is appropriate for this project. (Ex. 41, p. 8; Ex. 39, p. 9; 9/29 RT 36; 9/29 RT 118-119)
- Findings by the SJVUPCD that the WEC's ERCs are valid, are properly accounted for and can be used to mitigate the WEC's proposed emissions. (Ex. 40, p. 3)

- Findings by the City of Turlock, contained in numerous resolutions, authorizing conversion of the WEC parcel from agricultural to industrial use, without a requirement for additional mitigation measures. (Ex. 45, pp. 67-69)
- Testimony by the Turlock Irrigation District, a public agency, that it retains both the obligation and the right to ensure the safety of the facilities within its jurisdiction and that it has been committed to the goal of ensuring the security of generating and transmission facilities long before the events of September 11, 2001 focused national attention on these important issues. (Ex. 45, p. 42)

If the Commission extends to these findings the same "significant weight" that it has historically applied to the findings and recommendations of responsible local agencies, the Commission will find no basis for overriding their decisions.

III. AIR QUALITY

A. Staff's Proposed Condition AQ-C6 Concerning Ammonia Slip Should be Deleted.

In its Opening Brief, the CEC Staff argues that the Commission should impose a 5 ppm ammonia slip limit on WEC "because ammonia slip has the potential to contribute to secondary particulate formation." (Staff Opening Brief at 3). However, the Commission has in the past, and should in this case, recognize that such a claim is not sufficient to demonstrate that a 10 ppm ammonia slip limit will result in a significant air quality impact.[2]

The Staff asserts, as one reason for the Commission to set an ammonia slip limit lower than the limit authorized by the District, that "[t]he only testimony offered by the SJVAPCD on

[2] Mitigation measures are not required for effects which are not found to be significant. (CEQA Guidelines, 14 CCR §15126.4(a)(3).)

this issue was a statement that it believes that controlling NOx is 'more important' than the secondary particulate that may be formed from ammonia slip, implying that the SJVAPCD and the Commission must pick between controlling NOx and controlling ammonia slip." (*ibid.*) In fact, the implication asserted in the Staff Brief was expressly rejected by the District:

> Mr. Swaney: We feel that controlling the NOx emissions is more important than any secondary particulate that may be formed from 10 ppm ammonia versus 5 ppm.
> Ms. Holmes: Is it your -- when you say that it's more important to control the NOx emissions are you suggesting that the NOx emissions would be higher if the ammonia slip level were 5 ppm?
> Mr. Swaney: No, we are not. What we are saying is that we want to insure that the NOx limits are met without being unduly prescriptive on other issues where we don't feel that there is that much of an issue. (9/29 RT 41-42; emphasis added)

Similarly, Staff's position regarding the ammonia slip issue on the same set of facts in other cases has been contrary to what Staff seeks to impose in this case. For example, in the case of the San Joaquin Valley Energy Center, the Staff's written testimony on the issue of ammonia slip was as follows:

> The ammonia emissions from the project would come from the SCR system, which controls the NOx emissions, as unreacted ammonia, or "ammonia slip," that remains in the exhaust after passing through the SCR catalyst system. The San Joaquin Valley, as a result of agricultural ammonia emissions, is ammonia rich, meaning that ammonia is not the limiting reactant for secondary PM10 formation. This means higher ammonia emissions will not necessarily result in additional secondary PM10 formation; however, reducing NOx emissions will almost certainly reduce secondary PM10 formation. While the ammonia emissions are recognized as a necessary by-product of the NOx control system, staff still encourages the Applicant to control their ammonia slip emissions to the lowest possible extent, while maintaining the guaranteed NOx emission limit. (San Joaquin Valley Energy Center, 01-AFC-22, Staff Assessment, p. 4.1-43; emphasis added)

In contrast, the Staff's written testimony in the WEC proceeding on the issue of ammonia slip is the following:

> The ammonia emissions from the project would come from the SCR system, which controls the NOx emissions, as unreacted ammonia, or "ammonia slip," that remains in the exhaust after passing through the SCR catalyst system; and from the cooling tower exhaust due to the ammonia in the reclaimed water used in the cooling tower. The San Joaquin Valley, as a result of agricultural ammonia emissions, is noted to be ammonia rich, meaning that ammonia is not the limiting reactant for secondary PM10 formation (i.e. the emission inventory indicates that there is more ammonia available in the ambient air than the acid gas reactants, such as nitric acid from NOx and sulfuric acid from SOx needed to react with ammonia to form secondary particulate. Research (Watson 1998) has shown that in an ammonia rich area, a reduction of 50 percent ammonia will reduce 15 percent of fine particulate matter, equivalent to a 30 percent conversion rate for ammonia. Thus, if WEC maintains an emission rate of 675 lbs/day of ammonia (based on the applicant's proposed 10 ppm ammonia slip level) the equivalent secondary particulate (nitrates and sulfates) could be in the range of 900 to 1,600 lbs/day. This amount of secondary particulate is approximately two to four times as large as the project's proposed particulate matter emissions, and this does not include the additional ammonia emissions potential from the cooling tower. (Ex. 11, p. 4.1-40) (Emphasis added)

The beginning part of the Staff's testimony in these two cases is nearly identical.[3] However, in the case of SJVEC – where the Staff estimated total ammonia emissions to be 2551 lbs/day[4] - the Staff concluded that "[t]his means higher ammonia emissions will not necessarily result in additional secondary PM10 formation; however, reducing NOx emissions will almost certainly reduce secondary PM10 formation." (SJVEC Staff Assessment, *op.cit.*). In contrast, in the case of WEC – where the Staff estimated total ammonia emissions to be 675 lbs/day – the Staff concluded that "the area may be ammonia rich, and that the project's contribution to secondary particulates may be less than if the ambient air contained less ammonia. However, this does not mean that the project's ammonia emissions will not contribute to secondary particulate." (Ex. 11, p. 4.1-52).

[3] Staff's reference to a 1998 study by Watson et al should not be an indication of "new research" or changed circumstances. The Watson study had been published well before the Staff testimony was prepared in all of the cases cited herein. Furthermore, the Watson study, while referenced in the Staff's testimony, has not been admitted into evidence in this proceeding.

[4] 01-AFC-22, San Joaquin Valley Energy Center, Staff Assessment Addendum, p. 4.1-32, Table 18.

The use of phrases as "will not necessarily result" and "does not mean … will not contribute" underscores the tenuous nature of the Staff's opinions and positions.[5] Language similar to that contained in the Staff's testimony in the SJVEC proceeding can be found in Staff testimony for the Tracy Peaker Project, among others.

> The ammonia emission [*sic*] from the project are due to the existence of the SCR system which controls the NOx emissions, and are the result of unreacted ammonia, or "ammonia slip," that remains in the exhaust after passing through the SCR catalyst system. While the ammonia emissions are recognized as a necessary by-product of the NOx control system, staff still encourages the Applicant to control their ammonia slip emissions to the lowest possible extent, while maintaining the guaranteed NOx emission limit. (01-AFC-16, Tracy Peaker Project, Staff Assessment, p. 5-40).

This represents the sum total of the Staff's testimony on the secondary PM_{10} contributions of ammonia from the Tracy Peaker Project, in which they recommended a 10 ppm slip level.[6] The Staff estimated the ammonia emissions from the Tracy Peaker Project at 469 lbs/day. (01-AFC-16, Tracy Peaker Project, Staff Assessment, p. 5-25, Table 11). This is approximately 70% of the maximum daily ammonia emissions estimated for the WEC facility. It is inconceivable to the Applicant that a difference of 206 pounds per day of ammonia emissions is sufficient to justify a complete lack of analysis in the case of one project (TPP), and a conclusion of a significant impact that requires mitigation in another (WEC). This is particularly true in view of the CEC Staff's position that a 10 ppm slip level was appropriate for the SJVEC project, which has projected ammonia emissions more than three times higher than

[5] The Staff has asserted that their position in the SJVEC proceeding was the result of a "compromise" offered to the Applicant in that case. However, a review of the Staff Assessment Addendum in the SJVEC proceeding finds the word "compromise" only once – and there in the context of a proposal by the Staff that the Applicant reduce the allowable SO2 emissions from yet another project – the Pastoria Energy Facility – so as to free up SO2 emission reduction credits which could then be used to satisfy CEC requirements for SO2 mitigation in the SJVEC case.

[6] Although the CEC Staff has argued, and will continue to argue, that the Tracy Peaker Project is "different" because it is a simple cycle project and a 5 ppm ammonia slip level is not feasible for that technology, it is important to note that the rationale used by the CEC Staff in the TPP Staff Assessment was based on need and air quality considerations, and not on grounds of technical feasibility.

WEC. It should be inconceivable to the Committee as well, and the Committee should concur with the determinations of the air quality agencies that a 10 ppm ammonia slip level is sufficient and appropriate for the WEC.

The Staff continues in its argument that Applicant's testimony regarding the SJVUAPCD's PM_{10} air quality plan should be discounted in some way because EPA has not yet approved the plan. (Staff Opening Brief at 5). However, Staff fails to acknowledge that the plan has been approved by the California Air Resources Board, and that on the specific issue at hand – ammonia slip – neither ARB nor EPA submitted comments on the proposed TID permits suggesting that a 10 ppm ammonia slip limit was inadequate.

The Staff goes on to suggest that Applicant has misread or misquoted the PM_{10} plan, and that the plan is actually consistent with the Staff's position.

> When the sentence is read in conjunction with the preceding two sentences, it is clear that the sensitivity analysis in fact supports the staff position. (These statements explain (1) that the ambient data indicate that nitrate formation was not limited by the availability of ammonia, and (2) that the ambient data is inconsistent with the modeling results.) Thus, the modeling exercise relied upon by TID to support its claims that ammonia limits will not provide benefits itself produced counter-intuitive results and could not be supported by the ambient data. (Staff Opening Brief at p. 5).

The Staff's argument reflects the Staff's continuing confusion on this topic. The first numbered point in the preceding quote – that "the ambient data indicate that nitrate formation was not limited by the availability of ammonia" – is consistent with the prior testimony of both Applicant and Staff. What these words mean, in simple terms, is that the ambient data suggest that the region is ammonia rich and that reductions in ammonia would provide no air quality benefit. The second numbered point in the preceding quote – that "the ambient data is inconsistent with the modeling results" – refers to the fact that ARB's sensitivity analyses suggested that there might be a slight benefit associated with reducing ammonia emissions in the

southern end of the San Joaquin Valley, even though the ambient data suggests that there should be no benefit at all.

Applicant's presentation of these results is perfectly consistent with the cited conclusions, and they suggest that the PM_{10} benefits attributable to reductions in ammonia emissions in the San Joaquin Valley are slight (in the southern San Joaquin Valley, based on the modeling results) or non-existent (based on the ambient data).

For all of these reasons, the Committee should reject the Staff's proposed 5 ppm ammonia slip limit and accept the judgment of the regulatory agencies with expertise in the field of air quality.

B. Staff's Proposed Condition AQ-C8 Concerning Acceptability of Emission Reduction Credits should be deleted.

The Staff's Opening Brief presents a half-hearted defense of AQ-C8 that is premised on two faulty statements. First, the Staff suggests that EPA has already concluded that the two ERC certificates at issue are not acceptable.

> According to TID, there is no evidence in the record that disputes the acceptability of the credits. (Exh. 45, p. 10) However, this testimony ignores the letter provided to the SJVAPCD by U.S. EPA, stating, ". . . pre-baseline ERCs are not surplus if they are not correctly included in all of the relevant attainment plans." (Exh. 36) The letter clearly indicates that the U.S. EPA, which is responsible for implementing the federal Clean Air Act, believes that the ERCs may not meet the Clean Air Act requirement that such ERCs be surplus. (42 U.S.C.A § 7503(a)(1)(A)) (Staff Opening Brief at p. 7)

However, the passage cited by Staff from EPA's letter renders absolutely no judgment regarding the acceptability of the specific ERC certificates at issue. Rather, the quote restates EPA's requirements for ensuring that pre-baseline ERCs are acceptable – requirements that the SJVUAPCD has clearly indicated it complies with. (Ex. 40, p.3) Therefore, it is quite clear that the EPA letter does not dispute the acceptability of the specific ERC certificates.

Second, the Staff suggests that Applicant has agreed that it would stop construction of the project if approval of ERCs from EPA is not forthcoming:

> TID's own witness even testified that if there is no U.S. EPA approval in the future, it would halt construction of the facility. (9/29/03 RT, p. 76:12-24) (Staff Opening Brief at p. 7)

A review of the cited testimony indicates no such statement from Applicant's witness:

> HEARING OFFICER VALKOSKY: So what happens if a hypothetical that EPA did not approve the certificates a year or 18 months from now? Would you have to go out and get different ERCs, or what?
> MR. RUBENSTEIN: If that was the case, EPA would signal that by sending a letter to the applicant saying you should not -- and actually I would expect EPA would send out the letter much sooner than 18 months from now, they would say, you should not proceed to construct this project based on these certificates because we don't believe they're valid. (9/29 RT 76:12-24)

Applicant's witness was referring to the case where EPA affirmatively sent a letter indicating that the ERCs were not acceptable. Applicant's witness did not state that the next step, upon receipt of such a letter, would be to halt project construction. Instead, Applicant's witness described a process of negotiation with EPA that might ultimately lead to the substitution of alternative emission reduction credits.

> And if, in fact, such a letter were issued by EPA, TID would initially negotiate with EPA, see if we can get approval for these two certificates. If not, TID would have to go out and buy other certificates, which would then trigger a process of coming back to the Air District and to the Commission to revise both decisions. (9/29 RT 76:25 to 77:7)

Applicant's proposed revision for AQ-C8 is fully consistent with Applicant's testimony, and establishes a rational process to be followed in the event EPA determines, at some future date, that the specific emission reduction credits proposed for use for the WEC project are unacceptable. The Committee should adopt this language, and reject the Staff's proposal as an

unnecessary and unwarranted intrusion in a LORS determination by regulatory agencies with primary jurisdiction in this area.

IV. THE COMMISSION SHOULD NOT IMPOSE ADDITIONAL FARMLAND MITIGATION CONDITIONS

The Applicant's Opening Brief sets forth two independent bases for the Commission to reject the Staff's proposed additional mitigation measures.

First, given the extensive environmental review undertaken by the City of Turlock of the conversion of the WEC parcel from agricultural to industrial use, CEQA mandates that the farmland impacts of WEC shall not require further environmental review or further mitigation. The provisions of Section 15183 are mandatory and are expressly intended to streamline the review of projects such as the WEC and to reduce the need to prepare repetitive environmental studies. (14 Cal. Code of Regs., § 15183(a))

Second, the Commission should find, exactly as it did in the Final Decision in the Metcalf case, that the small number of converted acres would not constitute a significant environmental impact given the level and nature of projected development and the parcel's existing Industrial "I" designation (99-AFC-3, Commission Decision, p. 320). In the case of WEC, as in Metcalf, even if the power plant is not built, development will occur on the parcel.

The Staff's Opening Brief restates nearly verbatim the same argument that Staff presented during oral argument on October 9, 2003. We have already addressed these arguments in our Opening Brief, so we need not address these arguments again. We will however, make a few additional observations in response to the Staff's Opening Brief.

A. CEQA mandates that the farmland impacts of WEC shall not require further environmental review

At the outset, it is important to note the manner in which the Staff characterizes the prior environmental findings of the City of Turlock. The Staff asserts that the City adopted a resolution "claiming" that there was no feasible mitigation for the project and that the project benefits outweighed the impacts caused by the conversion. (Staff Opening Brief, p. 12) The Staff characterizes the City's analysis as "incomplete" (Staff Opening Brief, p. 13), although the City's analysis of farmland impacts is indisputably far more extensive than the Staff's own perfunctory CEQA analysis. (9/29 RT 209) And then the Staff speculates that if mitigation is not feasible for 4,700 acres of property, it may be feasible for 18 acres. (Staff Opening Brief, p. 14)

The extensive environmental documents that have been prepared by the City of Turlock are not mere "claims" or assertions of a party which the Commission may choose to accept or reject. These documents are legally binding findings pursuant to CEQA (Public Resources Code § 21167 *et seq.*), and these findings have already authorized conversion of the WEC site and surrounding properties to industrial use. These findings have the same legal force and effect as findings of this Commission. (*Id.*) Moreover, because the time for legal challenges of these findings has run (*Id.*), they may not be reversed, overridden or second-guessed by any person.[7] In simplest terms statutes of limitations (sometimes referred to as "statutes of repose") are enacted specifically for the purpose of providing finality to agency actions and certainty to those applicants that rely on those actions. Nothing in the Warren-Alquist Act, or any other applicable

[7] If no action or proceeding alleging that an environmental impact report does not comply with the provisions of this division is commenced during the period prescribed in subdivision (c) of Section 21167, the environmental impact report shall be conclusively presumed to comply with the provisions of this division for purposes of its use by responsible agencies, unless the provisions of Section 21166 are applicable. Public Resources Code §21167.2) Section 21166 requires a showing of new information or substantial changed conditions in order to reopen an EIR, none of which has been alleged in this proceeding.

law, authorizes the Staff to ignore, reverse, or revisit these decisions promulgated in compliance with CEQA.

Pursuant to Public Resources Code Section 21083.3, because WEC is consistent with the general plan of the City of Turlock and because an environmental impact report was certified with respect to that general plan, the application of CEQA is limited, as a matter of law, to review of the "effects on the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report." According to the CEQA guidelines, this limitation is mandatory. (14 Cal. Code of Regs., § 15183(a))

Public Resources Code Section 21083.3 operates to prevent the very kind of speculation and second-guessing in which the Staff attempts to engage. If any party believed that the City had unlawfully approved the conversion of the WEC site from agricultural to industrial use in 1992, if any party believed that the 2002 environmental review of this action was inadequate, if anyone believed that feasible mitigation measures were overlooked or that comments were ignored, the time to make these challenges was in 1992 and 2002, not in a collateral proceeding where such redundant review is expressly barred by PRC Section 21083.3.

The Staff also asserts that the language of PRC Section 21083.3 does not address whether a previous statement of overriding considerations can be used in conjunction with a "later project". This alleged issue is irrelevant to the case at bar. With respect to the conversion of farmland, the CEQA "project"[8] that caused the farmland conversion was the 1992 general plan

[8] Section 15378(a) of the CEQA guidelines defines "Project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: (1) ….enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections

amendment and rezoning, not the WEC. Thus, the WEC is not a "later project". The conversion of the parcel was already authorized by the discretionary governmental actions in 1992 and again in 2002, and the appropriate findings of override have already been made for the WEC site and all similarly zoned industrial property in the City of Turlock.

The Staff devotes one page of its Opening Brief to a discussion of legislative history. (Staff Opening Brief, p. 15) However, the Staff has not provided the Committee or the parties with copies of this alleged history, nor even provided citations to the documents. Therefore, the Staff has failed completely to lay a proper evidentiary foundation for this discussion of legislative history and the Committee has no basis whatsoever to evaluate the merits of these arguments.

Finally, the Staff complains that the Applicant has not addressed the effectiveness of the mitigation measures proposed by Staff. (Staff Opening Brief, p. 17) The Applicant did not address the effectiveness of the measures because the City of Turlock has made binding and conclusive findings not once, but twice, that there is no feasible mitigation. (Ex. 45, p. 65)

Nevertheless, there is evidence of record that demonstrates why the Staff's measures are not feasible. The Staff proposes to require the acquisition of agricultural easements in the "vicinity" of the WEC.[9] (Ex. 11, pp. 4.5-13) The land within one mile of the WEC within the city limits is zoned industrial. Similarly, the land within a one-mile radius of the WEC that is within the city's sphere of influence is also designated in the General Plan as Industrial (I). The land in the vicinity of the project located outside the city limits and its sphere of influence is

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65100-65700." Thus, the 1992 General Plan Amendment and rezoning of the WEC parcel was the "project" that had the potential to convert the parcel from agricultural to industrial use.

[9] The term "vicinity" is not defined by the Staff. The term is typically defined to mean a nearby, surrounding, or adjoining region; a neighborhood. *The American Heritage® Dictionary of the English Language, Fourth Edition, Copyright © 2000 by Houghton Mifflin Company.*

generally zoned Agricultural. If the Staff's proposed mitigation is imposed, TID will be required to create permanent agricultural lands within an industrial zone or planned industrial zone. Such a requirement would directly conflict with the goals and policies of the Turlock General Plan that are designed to minimize conflicts between agricultural and urban uses, by clearly separating the activities. A requirement to create permanent agricultural inholdings within an industrial zone is ill-conceived and would require an override of the Turlock General Plan policies intended to minimize incompatible activities within the industrial zone. (Ex. 49, EIR, p. 33). In addition, if industrial zoned property is permanently removed from industrial use (such as creating mini-pockets of agricultural reserves within the industrial zone) or otherwise excluded from the planning area, such limitations will put pressure on expansion of the limits of the urban boundaries, indirectly pushing growth elsewhere in the region (*Id.* at 50-51) In other words, the policy of the City (consistent with good urban planning principals) is to concentrate urban use within the urban zone, rather than mix urban and agricultural use within an urban zone, because such mixed use will inevitably lead to accelerated expansion of the urban limits.

While TID could purchase easements in the County, outside the industrial zone, such easements would either: 1) create the same problems just described by forcing such a site to be within a future city sphere of influence; or 2) if further away from the urban area and, therefore, not within the vicinity of the project, such easements would simply overlay lands already designated for agricultural use in the Turlock General Plan and not subject to future urbanization.

Thus, as explained in the City of Turlock's environmental documentation, there were sound reasons for finding that mitigation in the form of one-for-one set asides were not feasible.

B. The WEC will not cause a significant adverse effect or a significant cumulative effect on agricultural resources.

As demonstrated in the Applicant's Opening Brief, the Commission found in the Metcalf case, under similar facts, that the impact of a power plant on a small, industrial-zoned 20-acre parcel was not a significant adverse impact on agricultural resources.

The Staff's Opening Brief does not address the Metcalf case at all. Nor does the Staff cite any evidence in the record to show that the impact is not significant, for the Staff's testimony is devoid of factual content on this important issue. Instead, the Staff cites two court cases and a letter from the Department of Conservation.

To begin, subsection (j) of Section 15183 (Cal. Code of Regs., Title 14) mandates that the Commission give appropriate deference to the cumulative impacts analysis performed by the City of Turlock. Specifically, Section 15183(j) stated, in pertinent part: "This section does not affect any requirement to analyze potentially significant offsite or cumulative impacts if those impacts ***were not adequately discussed*** in the prior EIR. If a significant offsite or cumulative impact ***was adequately discussed*** in the prior EIR, then this section may be used as a basis for excluding further analysis of that offsite or cumulative impact." In this case, the City of Turlock performed an adequate cumulative impacts analysis. The adequacy of this analysis is confirmed, in part, by the fact that the cumulative impact analysis performed by the City in 1992, and again in 2002, were part of a detailed public approval process that was subject to judicial review. While Staff seeks to attack the adequacy of the City approval process, it is undisputed that the City approval process includes a much more detailed analysis of cumulative impacts than the cursory treatment found in the Staff's testimony. Accordingly, pursuant to Section 15183(j) the Commission can and must rely on the cumulative impacts analysis in the City's environmental documents.

Further, the court cases cited by Staff have no bearing on the question of whether the use of 18 acres would have a significant adverse impact on agricultural resources. Both cases address the question of cumulative impacts, which is a distinct question under CEQA.

The Staff provides a general cite to the case of *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 270 Cal.Rptr. 650 for the proposition that the "ratio" theory of significance has been rejected by courts interpreting CEQA. However, a close reading of the case reveals that the Court's mention of "ratio" is not in reference to the test of whether a project will have a significant adverse impact. Instead, the Court rejected a cumulative impacts analysis that had assumed that where impacts specific to a particular project are not significant, corresponding cumulative impacts cannot be considered significant because the "incremental effects" of the individual project cannot be "considerable." (*Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 720.) This case did not hold, as the Staff would argue, that all impacts, no matter how small, are significant.

Similarly, the case of *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120, 126 Cal.Rptr.2d 441 cited by Staff speaks to the question of cumulative impacts, as the passage quoted by Staff plainly indicates. This case does not address the question of the threshold for determining whether a project will have a significant adverse impact.

Finally, the Commission should give little weight to the letter from Erik Vink, Assistant Director of the Department of Conservation. The letter was not offered into evidence and Mr. Vink did not attend the evidentiary hearings.[10] The letter shares the same fundamental flaw as

[10] The Applicant contacted Mr. Vink to determine his availability for the October 9 evidentiary hearing. The Applicant was informed that Mr. Vink left the Department on October 3 in order to take a new job with the Trust for Public Land as Senior Project Manager for the Central Valley. TPL is a national land conservation organization and

the Staff's testimony – its conclusions are perfunctory, without any discussion of the relevant facts.

Significantly, the letter is artfully written to avoid actually drawing conclusions regarding the WEC. For example, it addresses the "typical" case, without opining on the specifics of the WEC site. Similarly, the letter states that the conversion could be considered as a "contributing factor to the cumulative impact of agricultural land conversion in Stanislaus County", without addressing the significance of the contribution. Further, the letter does not state that the purchase of easements are required because no such requirement exists in law; instead the letter merely suggests that purchase of easements "be considered". Given the artful (and perhaps intentional) ambiguities in the letter and the Department's failure to participate in the hearing, the Commission should give this letter little, if any, weight.[11]

Staff is quick to rely on some unspecified "CEQA" authority for the imposition of additional mitigation that Staff desires. However, CEQA does not create generalized power for the Staff under some ubiquitous yet undefined "CEQA" authority. Instead, "CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws." (14 CCR 15040(a)) Further, "CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws." (14 CCR 15040(b)) Further, "[t]he exercise of

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because the WEC is located in the Central Valley, TPL would potentially be a direct beneficiary of the mitigation proposed by the Staff.

[11] As set forth during oral argument, state policies for the preservation of agricultural land are found in the Williamson Act. (Gov. Code, 51200 *et seq.*) The Williamson Act establishes a mechanism for preserving significant agricultural lands by allowing counties to create agricultural preserves and then to enter into contracts with landowners within those preserves. The Department of Conservation, who commented on the WEC project, administers the Williamson Act. The WEC site is not under Williamson Act contract. If the Applicant went to the Department of Conservation for a Williamson Act Contract, the Department would reject the WEC project site because, among other things, the project site is less than 100 acres (Government Code Section 51230.) Further, while Williamson Act contacts are typically for 10 years with provisions for unilateral cancellation annually thereafter, the Staff in this case seeks to set aside agricultural land "in perpetuity." We cannot reconcile the Staff's position that an 18 acre parcel which is too small to be eligible for even temporary mitigation protection under the Williamson Act is nevertheless large enough to require permanent mitigation in this proceeding.

discretionary powers for environmental protection [pursuant to CEQA] shall be consistent with express or implied limitations provided by other laws." (14 CCR 15040(c)) Similarly, but not surprisingly, the Warren-Alquist Act does create some ubiquitous authority to impose requirements not required by the Act or CEQA. Accordingly, the Committee should find that no further farmland mitigation is required by CEQA, the Warren-Alquist Act, or any other applicable law.

V. THE COMMISSION SHOULD ADOPT GENERAL CONDITION OF CERTIFICATION – COM 8 AS PROPOSED BY THE APPLICANT.

For most, if not all, of the past 28 years that the Commission has licensed thermal powerplants, the Commission has delegated to the Project Owner and responsible local and state agencies the responsibility for ensuring the safety and security of the licensed facilities. Recently however, the requirements proposed by Staff for preparation of safety and security plans have proliferated. And while the regulatory requirements proposed by Staff continue to multiply, the responsibility delegated to the Project Owner and local law enforcement for implementing these new plans continues to decline.

The Applicant is already required to prepare a number of similar plans: (1) Business Plan (2) Risk Management Plan, (3) Safety Management Plan, (4) Emergency Action Plan, (5) Construction Injury Illness Prevention Program, (6) Construction Fire Protection and Prevention Program, (7) Operation Injury Illness Protection Program and a (8) Personal Protection Equipment Program. Staff now proposes to require (9) a Construction Security Plan, (10) Operations Security Plan and (11) Vulnerability Assessment Plan.

The Applicant shares the Commission's concern for maintaining safety and security at the Walnut Energy Center. Certain construction and operational plans are necessary to ensure

safe and secure operations. At the same time, the Applicant is concerned that a proliferation of new requirements, without templates to guide their preparation, without qualified staff to review their contents and without standards to judge their completeness, will add unnecessary cost and delay to the construction and operation of the WEC. The Applicant respectfully submits that these potential problems can be avoided if the Commission adopts the version of Condition COM-8 proposed by the Applicant.

One of the key issues is whether the Staff is qualified to review and approve Security Plans. In our Opening Brief we noted that the Staff's witness has never written, nor even read, a site-specific Security Plan for a power plant. He has similarly neither written, nor even read, a vulnerability assessment for a power plant. (10/9 RT 124) In response, Staff's Opening Brief asserts that "Commission Staff have reviewed a number of security plans" (Staff Opening Brief, p. 9); however none of the transcript references cited by Staff support this proposition. Thus, the evidence in the record is clear that the Staff has no familiarity or expertise for the writing or reviewing of the requested Security Plans.

The issue is not whether Security Plans should be reviewed and approved. The question is whether approval of these plans should be delegated to the Project Owner and law enforcement agencies with actual expertise in writing and reviewing such plans, or whether their review should be overridden by Commission Staff employees without any proven expertise.

Staff's COM-8 does not provide for an adequate appeal process in the event that Staff does not give its "approval" of Applicant's security plan for WEC. Instead of addressing this fundamental concern, Staff's Opening Brief focuses on peripheral issues such as the Commission's ability to hear confidential matters pursuant to Government Code § 11425.20. (Staff Opening Brief, p. 11.) The Applicant understands and appreciates that the Government

Code allows for, among other things, closed or confidential hearings to protect confidential or otherwise protected information. However, Government Code § 11425.20 does not address Applicant's fundamental concern -- the complete lack of an ***adequate appeal process*** to redress grievances should the Staff decide, without reference to any objective, clearly articulated standards, that the Applicant must halt construction or cease operations because Staff deems that the Applicant's Security Plans are somehow inadequate.

A second impediment to the Staff's request that it be granted authority to approve Security Plans and the Vulnerability Assessment is that the Staff lacks any standards by which to undertake their review. Staff concedes that there are no standards for preparation or review of the proposed Security Plans and Vulnerability Assessment, but Staff argues that "virtually all Commission conditions requiring plans identify performance standards rather than specific criteria." Staff clearly misses the point here. The issue is not whether the plans required by the Commission are "performance standards" or "specific criteria." The point is that in every other case of which we are aware, the Commission plans do include objective, clearly articulated ***standards***.[12] Further, Staff can provide examples of approvable plans to be used as models, without concerns regarding the confidential natures of security information. *In marked contrast, as to Security Plans, Staff has never reviewed such plans, never written such plans, cannot provide the Applicant with a model plan that was deemed approved, and most significantly, cannot even articulate the standards by which Security Plans would be judged.* It is the complete and absolute failure of Staff to identify any reasonable standards for judging the adequacy of a Security Plan that is most disturbing.

[12] For example, Biological Resources conditions for the BRMIMP include a list of criteria that must be included in the BRMIMP. Similarly, Business Plans and Risk Management Plans include clearly articulated, objective standards to be met.

Staff also argues that it would be difficult to write standards that are applicable to different types of projects. In fact, other agencies have been able to develop such standards. A standard then is simply a clear statement of the criteria the reviewer will use to determine the adequacy of a plan. As long as Staff cannot in its words even "imagine" a standard that would be applicable to the range of projects licensed by the Commission, Staff obviously lacks the necessary criteria to evaluate the adequacy of the plans it seeks to review and approve.

The third problem with the Staff's proposal for authority to approve Security Plans is the absence of adequate due process protections. The combined effect of the absence of clear standards for determining the adequacy of the Project Owner's security plans, together with the absence of a clear procedure for resolving disputes between the Project Owner and the Staff raise a potential for significant project delays.

Finally, we must address briefly the question of when the Operation Security Plan must be approved. Staff seeks to require approval of this plan at least 60 days to initial on-site receipt of hazardous materials. These materials will be delivered during the construction phase and their use will be regulated by the Construction Security Plan. Therefore, there is simply no reason why the Operation Security Plan needs to be approved before the plant becomes operational.

Moreover, the Staff's argument that to allow delivery of hazardous materials without approval by Staff of a plan is an "abrogation" of the Commission's responsibility. A delegation of responsibility to TID, a responsible public agency, is not an abrogation. It is simply a delegation, and it is appropriate to delegate to TID the approval of a Security Plan to be administered by TID.

There is no requirement in the Warren Alquist Act that the CPM must approve every aspect of the construction and operation of licensed facilities. While such a requirement increases the cost of government, it does not serve any legitimate public interest.

VI. CONCLUSION

With only four exceptions, Applicant and Staff have agreed upon all of the proposed Conditions of Certification proposed for this Project. These four areas of disagreement all center on the question of whether the question should defer to the expertise of the responsible permit agencies and delegate responsibility to TID on matters of security, or as Staff would propose, whether the Commission should override the findings of the responsible agencies and replace the expert findings of these agencies with the unfounded, unsupported and often perfunctory recommendations of Staff.

We thank the Committee for its careful consideration of these important issues and we look forward to the timely issuance of a PMPD recommending approval of the Walnut Energy Center.

Respectfully submitted,

Dated: November 14, 2003 ELLISON, SCHNEIDER & HARRIS L.L.P.

By _____

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 02-AFC-4
Application for Certification of the	)	
Walnut Energy Center by Turlock Irrigation District	)	
	)	

PROOF OF SERVICE

I, Ron O'Connor, declare that on November 14, 2003, I deposited copies of the attached *Applicant's Reply Brief* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.

Ron O'Connor

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